



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2019-0010; FRL-9992-44-Region 3]

Approval and Promulgation of Air Quality Implementation Plans;

Delaware; Nonattainment New Source Review Requirements for 2008 8-Hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a revision to Delaware's state implementation plan (SIP). The SIP revision is in response to EPA's February 3, 2017 Findings of Failure to Submit for various requirements relating to the 2008 8-hour ozone national ambient air quality standards (NAAQS). This SIP revision is specific to nonattainment new source review (NNSR) requirements. EPA is approving this revision in accordance with the requirements of the Clean Air Act (CAA).

DATES: Written comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R03-OAR-2019-0010 at <https://www.regulations.gov>, or via email to gordon.mike@epa.gov. For comments submitted at Regulations.gov, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit

electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the “For Further Information Contact” section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Amy Johansen, Office of Permits and State Programs (3AP10), Air Protection Division, U.S. Environmental Protection Agency, Region 3, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215)814-2156. Ms. Johansen can also be reached via electronic mail at johansen.amy@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On June 29, 2018, the Department of Natural Resources and Environmental Control (DNREC) submitted on behalf of the state of Delaware a formal SIP revision, requesting EPA’s approval of its NNSR Certification for the 2008 8-hour ozone NAAQS. This SIP revision is in response to EPA’s final 2008 8-hour ozone NAAQS Findings of Failure to Submit for NNSR requirements. *See* 82 FR 9158 (February 3, 2017). Specifically, Delaware is certifying that its existing NNSR program, covering the Delaware portion of the Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE (Philadelphia Area) nonattainment area (which includes New Castle County) and the

entire Seaford, DE (Seaford Area) nonattainment area (which includes Sussex County) for the 2008 8-hour ozone NAAQS, is at least as stringent as the requirements at 40 CFR 51.165, as amended by the final rule titled “Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements” (SIP Requirements Rule), for ozone and its precursors.^{1,2} See 80 FR 12264 (March 6, 2015).

A. 2008 8-Hour Ozone NAAQS

On March 12, 2008, EPA promulgated a revised 8-hour ozone NAAQS of 0.075 parts per million (ppm). See 73 FR 16436 (March 27, 2008). Under EPA’s regulations at 40 CFR 50.15, the 2008 8-hour ozone NAAQS is attained when the three-year average of the annual fourth-highest daily maximum 8-hour average ambient air quality ozone concentration is less than or equal to 0.075 ppm.

Upon promulgation of a new or revised NAAQS, the CAA requires EPA to designate as nonattainment any area that is violating the NAAQS based on the three most recent years of ambient air quality data at the conclusion of the designation process. The Seaford and Philadelphia Areas were classified as marginal nonattainment for the 2008 8-hour ozone NAAQS on May 21, 2012 (effective July 20, 2012) using 2008-2010 ambient air quality data.

See 77 FR 30088. On March 6, 2015, EPA issued the final SIP Requirements Rule, which

¹ The SIP Requirements Rule addresses a range of nonattainment area SIP requirements for the 2008 8-hour ozone NAAQS, including requirements pertaining to attainment demonstrations, reasonable further progress (RFP), reasonably available control technology, reasonably available control measures, major new source review, emission inventories, and the timing of SIP submissions and of compliance with emission control measures in the SIP. The rule also revokes the 1997 ozone NAAQS and establishes anti-backsliding requirements.

² On February 16, 2018, the United States Court of Appeals for the District of Columbia Circuit (D.C. Cir. Court or Court) issued an opinion on the EPA’s SIP Requirements Rule. *South Coast Air Quality Mgmt. Dist. v. EPA*, 882 F.3d 1138, 2018 U.S. App. LEXIS 3636 (D.C. Cir. February 16, 2018). The D.C. Cir. Court found certain provisions from the SIP Requirements Rule, including certain provisions relating to anti-backsliding, to be inconsistent with the statute or unreasonable and vacated those provisions. *Id.* The Court found other parts of the SIP Requirements Rule unrelated to anti-backsliding and this action reasonable and denied the petition for appeal on those provisions. *Id.*

establishes the requirements that state, tribal, and local air quality management agencies must meet as they develop implementation plans for areas where air quality exceeds the 2008 8-hour ozone NAAQS. *See* 80 FR 12264. Areas that were designated as marginal ozone nonattainment areas were required to attain the 2008 8-hour ozone NAAQS no later than July 20, 2015, based on 2012-2014 monitoring data. *See* 40 CFR 51.1103. The Seaford Area attained the 2008 8-hour ozone NAAQS by July 20, 2015 and the EPA Administrator signed a final Determination of Attainment (DOA) on April 11, 2016. *See* 81 FR 26697 (May 4, 2016). The Philadelphia Area did not attain the 2008 8-hour ozone NAAQS by July 20, 2015; however, the area did meet the CAA section 181(a)(5) criteria, as interpreted in 40 CFR 51.1107, for a one-year attainment date extension. *Id.* Therefore, in same rulemaking action, the EPA Administrator signed a final rule extending the Philadelphia Area 8-hour ozone NAAQS attainment date from July 20, 2015 to July 20, 2016. *Id.*³

Based on initial nonattainment designations for the 2008 8-hour ozone NAAQS, as well as the March 6, 2015 final SIP Requirements Rule, Delaware was required to develop a SIP revision addressing certain CAA requirements for the Seaford and Philadelphia Areas, and submit to EPA a NNSR Certification SIP or SIP revision no later than 36 months after the effective date of the areas designations for the 2008 8-hour ozone NAAQS (i.e., July 20, 2015).⁴ *See* 80 FR 12264 (March 6, 2015). EPA is proposing to approve Delaware's June 29, 2018 NNSR Certification SIP revision. EPA's analysis of how this SIP revision addresses the NNSR requirements for the

³ On November 2, 2017, EPA approved a DOA for the 2008 8-hour ozone NAAQS for Philadelphia Area. This action was based on complete, certified, and quality assured ambient air quality monitoring data for the 2013-2015 monitoring period. *See* 82 FR 50814. It should be noted that a DOA does not alleviate the need for Delaware to certify that their existing SIP approved NNSR program is as stringent as the requirements at 40 CFR 51.165, as NNSR applies in nonattainment areas until an area has been redesignated to attainment.

⁴ Neither Delaware's obligation to submit the NNSR Certification SIP nor the requirements governing that submission were affected by the D.C. Circuit's February 16, 2018 decision on portions of the SIP Requirements Rule in *South Coast Air Quality Mgmt. Dist. v. EPA*.

2008 8-hour ozone NAAQS is provided in Section II of this rulemaking action.

B. 2017 Findings of Failure to Submit SIP for the 2008 8-Hour Ozone NAAQS

Areas designated nonattainment for the ozone NAAQS are subject to the general nonattainment area planning requirements of CAA section 172 and also to the ozone-specific planning requirements of CAA section 182.⁵ States in the ozone transport region (OTR), such as Delaware, are additionally subject to the requirements outlined in CAA section 184.

Ozone nonattainment areas in the lower classification levels have fewer and/or less stringent mandatory air quality planning and control requirements than those in higher classifications. For marginal areas, such as the Seaford and Philadelphia Areas, a state is required to submit a baseline emissions inventory, adopt a SIP requiring emissions statements from stationary sources, and implement a NNSR program for the relevant ozone standard. *See* CAA section 182(a).⁶ For each higher ozone nonattainment classification, a state needs to comply with all lower area classification requirements, plus additional emissions controls and more expansive NNSR offset requirements.

The CAA sets out specific requirements for states in the OTR.⁷ Upon promulgation of the 2008 8-hour ozone NAAQS, states in the OTR were required to submit a SIP revision addressing

⁵ Ozone nonattainment areas are classified based on the severity of their ozone levels (as determined based on the area's "design value," which represents air quality in the area for the most recent three years). The possible classifications for ozone nonattainment areas are Marginal, Moderate, Serious, Severe, and Extreme. *See* CAA section 181(a)(1).

⁶ EPA approved Delaware's 2011 base year inventories for both the Seaford and Philadelphia Areas (specifically, Sussex and New Castle County, Delaware). *See* 80 FR 59052 (October 1, 2015). Delaware also submitted their emissions statements certification to EPA for approval on June 29, 2018. EPA is addressing the emissions statements certification in a separate rulemaking action.

⁷ CAA section 184 details specific requirements for a group of states (and the District of Columbia) that make up the OTR. States in the OTR are required to submit RACT SIP revisions and mandate a certain level of emissions control for the pollutants that form ozone, even if the areas in the state meet the ozone standards. While not the subject of this action, EPA approved Delaware's OTR RACT SIP. *See* 82 FR 57849 (December 8, 2017).

reasonable available control technology (RACT). *See* 40 CFR 51.1116. This requirement is the only recurring obligation for an OTR state upon revision of a NAAQS, unless that state also contains some portion of a nonattainment area for the revised NAAQS.⁸ In that case, the nonattainment requirements described previously also apply to those portions of that state (Delaware in this case). In the March 6, 2015 SIP Requirements Rule, EPA detailed the requirements applicable to ozone nonattainment areas, as well as requirements that apply in the OTR, and provided specific deadlines for SIP submittals. *See* 80 FR 12264.

On February 3, 2017, EPA found that 15 states and the District of Columbia failed to submit SIP revisions in a timely manner to satisfy certain requirements for the 2008 8-hour ozone NAAQS that apply to nonattainment areas and/or states in the OTR. *See* 82 FR 9158. These Findings of Failure to Submit established certain deadlines for the imposition of sanctions, if a state does not submit a timely SIP revision addressing the requirements for which the finding is being made, and for EPA to promulgate a Federal implementation plan (FIP) to address any outstanding SIP requirements.

EPA found, *inter alia*, that Delaware failed to submit SIP revisions in a timely manner to satisfy NNSR requirements for the Seaford and Philadelphia Areas. Delaware submitted its June 29, 2018 SIP revision to address the specific NNSR requirements for the 2008 8-hour ozone NAAQS, located in 40 CFR 51.160-165, as well as its obligations under EPA's February 3, 2017 Findings of Failure to Submit. EPA's analysis of how this SIP revision addresses the NNSR requirements for the 2008 8-hour ozone NAAQS and the Findings of Failure to Submit is provided in Section II of this rulemaking action.

⁸ NNSR requirements continue to apply in the OTR. *See* CAA section 184(b).

II. Summary of SIP Revision and EPA Analysis

This rulemaking action is specific to Delaware's NNSR requirements. NNSR is a preconstruction review permit program that applies to new major stationary sources or major modifications at existing sources located in a nonattainment area.⁹ The specific NNSR requirements for the 2008 8-hour ozone NAAQS are located in 40 CFR 51.160 through 51.165. As set forth in the SIP Requirements Rule, for each nonattainment area, a NNSR plan or plan revision was due no later than 36 months after the July 20, 2012 effective date of area designations for the 2008 8-hour ozone standard (i.e., July 20, 2015).¹⁰

The minimum SIP requirements for NNSR permitting programs for the 2008 8-hour ozone NAAQS are located in 40 CFR 51.165. *See* 40 CFR 51.1114. These NNSR program requirements include those promulgated in the "Phase 2 Rule" implementing the 1997 8-hour ozone NAAQS (75 FR 71018 (November 29, 2005)) and the SIP Requirements Rule implementing the 2008 8-hour ozone NAAQS. Under the Phase 2 Rule, the SIP for each ozone nonattainment area must contain NNSR provisions that: set major source thresholds for oxides of nitrogen (NO_x) and volatile organic compounds (VOC) pursuant to 40 CFR 51.165(a)(1)(iv)(A)(1)(i)-(iv) and (2); classify physical changes as a major source if the change would constitute a major source by itself pursuant to 40 CFR 51.165(a)(1)(iv)(A)(3); consider any significant net emissions increase of NO_x as a significant net emissions increase for ozone pursuant to 40 CFR 51.165(a)(1)(v)(E); consider certain increases of VOC emissions in extreme ozone nonattainment areas as a significant net emissions increase and a major modification for

⁹ *See* CAA sections 172(c)(5), 173 and 182.

¹⁰ With respect to states with nonattainment areas subject to a Findings of Failure to Submit NNSR SIP revisions, such revisions would no longer be required if the area were redesignated to attainment. The CAA's prevention of significant deterioration (PSD) program requirements apply in lieu of NNSR after an area is redesignated to attainment. For areas outside the OTR, NNSR requirements do not apply in areas designated as attainment.

ozone pursuant to 40 CFR 51.165(a)(1)(v)(F); set significant emissions rates for VOC and NO_x as ozone precursors pursuant to 40 CFR 51.165(a)(1)(x)(A)-(C) and (E); contain provisions for emissions reductions credits pursuant to 40 CFR 51.165(a)(3)(ii)(C)(1)-(2); provide that the requirements applicable to VOC also apply to NO_x pursuant to 40 CFR 51.165(a)(8); and set offset ratios for VOC and NO_x pursuant to 40 CFR 51.165(a)(9)(i)-(iii) (renumbered as (a)(9)(ii)-(iv) under the SIP Requirements Rule for the 2008 8-hour ozone NAAQS). Under the SIP Requirements Rule for the 2008 8-hour ozone NAAQS, the SIP for each ozone nonattainment area designated nonattainment for the 2008 8-hour ozone NAAQS and designated nonattainment for the 1997 ozone NAAQS on April 6, 2015, must also contain NNSR provisions that include the anti-backsliding requirements at 40 CFR 51.1105. *See* 40 CFR 51.165(a)(12).

Delaware's SIP approved NNSR program, established in Title 7 Delaware Administrative Code (DE Admin Code) 1125 (*Requirements for Preconstruction Review*), apply to the construction and modification of major stationary sources in nonattainment areas. In its June 29, 2018 SIP revision, Delaware certifies that the version of Title 7 DE Admin Code Section 1125 approved in the SIP is at least as stringent as the Federal NNSR requirements for the Seaford and Philadelphia Areas. EPA last approved revisions to Delaware's NNSR SIP on February 28, 2013. *See* 78 FR 13496. In that action, EPA approved revisions to Delaware's SIP which made DNREC's NNSR program consistent with Federal requirements. *Id.* EPA notes that neither 7 DE Admin Code 1125 nor Delaware's approved SIP have the regulatory provision for any emissions change of VOC in extreme nonattainment areas, specified in 40 CFR 51.165(a)(1)(v)(F), because Delaware has never had an area designated extreme nonattainment for any of the ozone NAAQS. Therefore, the Delaware SIP is not required to have this requirement for VOC in extreme nonattainment areas until such time as Delaware has an extreme

ozone nonattainment area.

As for consistency with 40 CFR 51.165(a)(3)(ii)(C)(1), Delaware's approved SIP contains appropriate regulatory provisions establishing emissions reduction credits (ERC) that are permanent, quantifiable, and Federally enforceable.¹¹ See 7 DE Admin Code 1125 Section 2.5.1. However, neither 7 DE Admin Code 1125 nor Delaware's approved SIP contain a regulatory provision pertaining to establishing ERC, as specified in 40 CFR 51.165(a)(3)(ii)(C)(2)(i) and 40 CFR 51.165(a)(3)(ii)(C)(2)(ii). Nonetheless, even if Delaware's regulations do not offer these specific emissions reductions credit options, as stated previously, their approved SIP is still adequate to meet the standard ERC requirements found in 40 CFR 51.165(a)(3)(ii)(C)(1), where emissions reductions must be surplus, permanent, quantifiable, and Federally enforceable, for example. See 7 DE Admin Code 1125, Section 2.5.1. Delaware has the appropriate ERC requirements approved in their SIP, which enables them to implement the program appropriately and in accordance with Federal requirements.

Given the D.C. Cir. Court's recent ruling in *South Coast Air Quality Mgmt. Dist. v. EPA* vacating the anti-backsliding provisions of the SIP Requirements Rule, Delaware remains required to comply with the anti-backsliding provisions found in 40 CFR 51.165(a)(12). In Delaware, neither 7 DE Admin Code 1125 nor the Delaware SIP contain the anti-backsliding language found in 40 CFR 51.165(a)(12), which applied to NNSR requirements for the 1997 ozone NAAQS. However, EPA finds that 7 DE Admin Code 1125 and Delaware's SIP presently include all required major stationary source thresholds and emissions offset ratios for NSR

¹¹ On October 20, 2016, EPA disapproved a proposed SIP revision that sought to include additional ERC provisions, adopted by Delaware on December 11, 2016, into the Delaware SIP, specifically, 7 DE Admin Code 1125 Sections 2.5.5 and 2.5.6. See 81 FR 72529. Since EPA disapproved these provisions, the previously approved provisions that EPA approved into Delaware's SIP on October 2, 2012 remain applicable Federal requirements. See 77 FR 60053.

purposes.

The entire state of Delaware is located within the OTR and any source in the OTR is considered major for NO_x and VOC if it emits or has the potential to emit at least 100 tons per year or 50 tons per year, respectively. *See* CAA section 184(b). This major stationary source threshold requirement is specified in 7 DE Admin Code 1125, Sections 1.9 and 2.2.2.1, as well as Delaware's approved SIP, and is equivalent to the requirements which would be applicable to major stationary sources in a moderate nonattainment area. On April 30, 2004, the Philadelphia Area, which included New Castle, Kent, and Sussex Counties, was designated as moderate nonattainment for the 1997 8-hour ozone NAAQS. *See* 69 FR 23951 and 40 CFR 81.308.

Additionally, in Delaware, the term "significant" when used in reference to a source's emission rates for NO_x and VOC are lower than the typical emissions rate for an area that is moderate nonattainment. For example, in 7 DE Admin Code 1125 Section 1.9, an emissions increase is considered "significant" if it equals or exceeds 25 tons per year of NO_x or VOC in New Castle or Kent Counties, which is based on the severe area designation those counties had for the prior 1-hour ozone NAAQS and 40 tons per year of NO_x or VOC in Sussex County.¹² Therefore, EPA finds that Delaware's regulations and approved SIP are more stringent than EPA's NNSR anti-backsliding requirements and its program is adequate to implement NNSR for the 2008 ozone NAAQS. Delaware's major stationary source threshold and offset provisions in 7 DE Admin Code 1125 remain in its Federally-approved SIP unless and until EPA approves a full NAAQS redesignation request from Delaware in accordance with CAA section 107. Thus, EPA finds that Delaware's SIP includes relevant and required anti-backsliding requirements. EPA expects that

¹² As identified previously in Section I.A. in this rulemaking, the Seaford and Philadelphia Areas are classified as marginal nonattainment for the 2008 8-hour ozone NAAQS, a classification imposes less stringent requirements than an area classified as moderate nonattainment.

DNREC will continue to implement its NNSR program consistent with its approved SIP for major stationary source thresholds and emission offset ratios.

The version of 7 DE Admin Code 1125 that is contained in the current SIP has not changed, with respect to NNSR since the 2013 rulemaking where EPA last approved Delaware's NNSR provisions. This version of the SIP approved rule covers the Seaford and Philadelphia Areas and remains adequate to meet all applicable NNSR requirements for the 2008 8-hour ozone NAAQS found in 40 CFR 51.165, the Phase 2 Rule and the SIP Requirements Rule.

III. Proposed Action

EPA is proposing to approve Delaware's June 29, 2018 SIP revision addressing the NNSR requirements for the 2008 ozone NAAQS for the Seaford and Philadelphia Areas. EPA has concluded Delaware's submission fulfills the 40 CFR 51.1114 revision requirement, meets the requirements of CAA sections 110 and 172 and the minimum SIP requirements of 40 CFR 51.165, as well as its obligations under EPA's February 3, 2017 Findings of Failure to Submit. *See* 82 FR 9158. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866.
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule, approving Delaware's 2008 8-hour ozone NAAQS Certification SIP revision for NNSR does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 et seq.

Dated: April 4, 2019.

Cecil Rodrigues,

Acting Regional Administrator,

Region III.

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